LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 5 1971
E. ROBERT SEAVER, CLERK

No. 71-214

In the Supreme Court of the United States

OCTOBER TERM, 1971

UNITED BONDING INSURANCE CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
WILL WILSON,
Assistant Attorney General,
ROGER PAULEY,
FREDERICK W. READ III,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-214

UNITED BONDING INSURANCE CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A6-A10) is reported at 444 F. 2d 742.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1971. The petition for a writ of certiorari was filed on August 11, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court abused its discretion in refusing to remit a bond forfeiture judgment.

RULE INVOLVED

Rule 46(f) of the Federal Rules of Criminal Procedure provides in part:

> (f) Forfeiture.
>
> * * * * *
>
> (2) *Setting Aside.* The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.
>
> (3) *Enforcement.* When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. * * *
>
> (4) *Remission.* After entry of such judgment, the court may remit it in whole or in part under the conditions applying to setting aside of forfeiture in paragraph (2) of this subdivision.

STATEMENT

The relevant facts are set forth in the opinion of the court of appeals (Pet. App. A). In August 1968, one Rudolph Williams was convicted of bank robbery in the United States District Court for the District of Kansas. He was sentenced to ten years' imprisonment. Williams filed a notice of appeal, and petitioner, a bonding company, guaranteed a $15,000 bail bond (Pet. App. A1–A3). Thereafter, Williams was released from federal custody pending the outcome of his appeal.

On December 18, 1968, Williams was arrested by Kansas police and incarcerated on state charges arising from events subsequent to his release from federal custody. Two days later the government moved in the

district court for recommittal of Williams and for forfeiture of his bail bond. A copy of this motion, and of the district court's order setting a hearing for December 24, 1968, were served on Williams personally and on Williams' court appointed trial counsel.

Neither Williams, his counsel, nor any representative of petitioner appeared at the December 24 hearing. A police officer testified for the government that he had arrested Williams in connection with an armed robbery which had occurred in Kansas City on December 11, 1968, and that he had found jewelry reportedly stolen in the theft on Williams' person at that time (Tr. 6–8).[1] The district court revoked Williams' liberty under the bond on the ground that he was a "danger to the community" and ordered that the bond be forfeited on the ground that Williams had "violated the terms and conditions."[2] (Tr. 12). In January 1969, after a preliminary hearing, Williams was discharged by state authorities and taken into federal custody.

On March 7, 1969, the government filed a motion in district court to enter judgment against Williams and petitioner under the December 24, 1968, forfeiture order. This motion specifically urged that the forfeiture was justified by Williams' non-appearance at the

---

[1] "Tr" refers to the transcript of the December 24, 1968, forfeiture hearing, a copy of which we are lodging with the Clerk of this Court.

[2] The district court did not specify which conditions of the bond Williams had breached. The terms of the bond (Pet. App. A1–A2) provided that it would be forfeited if Williams failed to appear in response to an order of the court. The government at the December 24, 1968, hearing called the court's attention to the fact that Williams was not present (Tr. 4).

December 24 hearing. A copy of this motion and the district court's order setting a hearing for March 24, 1969, were mailed to Williams, petitioner, and petitioner's attorney. At the March 24 hearing no one appeared on behalf of Williams or petitioner. The district court granted judgment against Williams and petitioner in the sum of $15,000. On April 10, 1970, the district court denied petitioner's motion to remit the forfeiture judgment. The court of appeals affirmed (Pet. App. A6–A10).

ARGUMENT

Under Rule 46(f)(4), district courts have wide discretion in the remission of bail forfeitures. *Brown* v. *United States*, 410 F. 2d 212, 218 (C.A. 5); *United States* v. *Agueci*, 379 F. 2d 277, 278 (C.A. 2), certiorari denied *sub nom. Stuyvesant Insurance Co.* v. *United States*, 389 U.S. 897; *Smith* v. *United States*, 357 F. 2d 486, 490 (C.A. 5); *Larson* v. *United States*, 296 F. 2d 167, 170 (C.A. 8). Petitioner contends here that the district court abused this discretion in refusing to remit because the only possible ground for forfeiture was Williams' non-appearance at the December 24, 1968, hearing, a condition that he could not possibly satisfy due to his incarceration by state authorities.

But, as pointed out by the court of appeals (Pet. App. A9), imprisonment of a principal by another sovereignty excuses neither him nor the surety if he fails to appear as required by order of the court. See *Taylor* v. *Taintor*, 16 Wall. 366, 370; *Sifuentes-Romero* v. *United States*, 374 F. 2d 620 (C.A. 5); but see *United States* v. *Nash*, 429 F. 2d 533 (C.A. 8).

Moreover, whatever might be the merit to petitioner's contentions, the proper time for it to raise its objections was at the March 24, 1969, hearing on the government's motion to enter judgment. Yet, petitioner, though fully notified, failed to appear at that hearing, and, as the court of appeals noted (Pet. App. A10), it has never offered any explanation for its failure. In these circumstances, the district court did not abuse its discretion in subsequently denying petitioner's tardy application for relief from the judgment enforcing forfeiture.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
ROGER PAULEY,
FREDERICK W. READ, III,
Attorneys.

OCTOBER 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971